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THE THREAT TO CIVIL LIBERTIES AND ITS EFFECT ON MUSLIMS IN AMERICA

HEENA MUSABJI* AND CHRISTINA ABRAHAM**

INTRODUCTION

The September 11, 2001 attacks on the World Trade Center changed America in many ways. The aftermath of the attacks led to vast changes in our governmental structure through the creation of The Department of Homeland Security (DHS) and the enactment of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act) and other laws and policies.

Section 102 of the PATRIOT Act condemns discrimination against Arab and Muslim Americans; yet, implementation of policies under the Act and other current U.S. policies has the opposite effect.¹ The Act instead creates a disparate impact on individuals including denying civil rights and liberties to all peo-

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¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub L. No. 107-56, § 202 (2007).

ple. National security is an important concern for each and every American, but as a nation we cannot sacrifice civil liberties and promote discrimination against certain groups in pursuit of such security. Such discriminatory policies can only breed a greater threat.

In an effort to promote national security, the former Immigration and Naturalization Service (INS), which was a part of the Department of Justice, has become three separate agencies under the Department of Homeland Security.² These agencies include: the U.S. Citizenship and Immigration Services (USCIS), which is charged with processing various immigration applications and benefits; the U.S. Immigration and Customs Enforcement (ICE), which is charged with eliminating vulnerabilities to our border, economic and transportation security; and the U.S. Customs and Border Patrol (CPB), which is charged with regulating international trade and enforcing trade law.³ The creation of these agencies has greatly expanded INS' previous role by adding responsibilities that had traditionally belonged to other former agencies. This expansion was done with the intent to more easily track and deter threats to our borders and within our country.

Among some of the issues that have arisen as a result of these policies are delays in the naturalization process that disproportionately affect Muslims seeking U.S. citizenship or other benefits. Background checks are important, but without any time limitations they not only unnecessarily burden applicants, but

² On March 1, 2003, INS ceased to exist and its principal functions were transferred to the newly created USCIS within Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 471,116 Stat. 2135, 2205 (2002) (codified at 6 U.S.C. § 291(a)); 8 U.S.C. §1103(a)(1). Authority and responsibility to administer and enforce all laws pertaining to immigration, including the adjudication of naturalization applications, was transferred from the Commissioner of the INS to the Director of the USCIS. See 6 U.S.C. § 271(b)(2); 8 U.S.C. § 1103(a)(1).

³ For more information on the overall organization of the Department of Homeland Security, see the Department of Homeland Security website, <http://www.dhs.gov/xabout/#> (last visited Aug. 20, 2007).

also pose a substantial threat to national security. These delays often result in the background checks not being completed, thereby allowing potentially dangerous individuals to remain within our borders. Muslims also have found themselves the frequent targets of racial profiling while traveling. The current post-9/11 climate in the United States today is one in which many openly advocate for racial profiling, despite its repugnance to the Constitution. Moreover, the provisions of the PATRIOT Act, policies of the Bureau of Prisons and the Military Commissions Act have all contributed to the erosion of civil liberties in the United States – the effects of which will not solely be felt by Muslims in America.

Section I of this article will discuss how current immigration policies disproportionately affect Muslim Americans and Muslim communities applying for citizenship. Section II will examine how in the post-9/11 environment, the United States government has infringed Muslim individuals' ability to travel. Section III will explore the specifics of the PATRIOT Act and its impact on Arab and Muslim Americans. Section IV will discuss treatment of Muslim individuals within the American prison system. Section V will discuss how the Military Commissions Act targets Muslim individuals through its vague definition of "unlawful alien combatants."

I. POLICY OF HEIGHTENED BACKGROUND CHECKS INDEFINITELY HINDERS NATURALIZATION

On a daily basis our office receives calls from individuals who have been legal permanent residents of the United States for a decade or more. These individuals have created lives for themselves in the United States and rooted themselves in this country by raising their families, buying homes, starting businesses and paying taxes. Most of these individuals have no criminal background or any reason to be suspected as a potential threat and only desire citizenship in order to fully participate in American

life through participating in civic activities, holding government positions and reuniting their families. They want to be able to travel freely without being denied re-entry to the United States, a country which they consider to be their home. The individuals have fulfilled all of the requirements to become naturalized citizens. They have filled out the requisite forms, undergone and cleared the FBI criminal fingerprint check and passed the naturalization examination. They have patiently waited to receive the notice to appear for their naturalization oath ceremony. They are told that in just a short while they will be U.S. citizens, but the weeks become months and the months become years. Their inquiries receive responses such as “no information on your application is currently available” or “your case is not yet ready for a decision,” or “a required investigation into your background remains open.”⁴ There is no timeline given for the expected completion of the investigation, for when the case will be ready for a decision or for when information will become available for the individual’s application. The individual is told not to inquire on his case again until six more months have passed. These responses confuse the individuals because they were assured that they had fulfilled the necessary requirements and within a matter of weeks or a few months they would be naturalized. One year, three years or even five years have passed since the naturalization interview and exam, yet citizenship is nowhere in sight. What do these background checks consist of, and why is it taking so long for individuals to obtain a privilege that they rightfully deserve under the laws of the United States? In addition, why are certain groups indefinitely delayed over others?

⁴ This information is based on individual clients that CAIR-Chicago represents. Specific case information and files are stored in the CAIR-Chicago files at 28 E. Jackson Blvd., Suite 1410, Chicago, Ill. *See also* CAIR-Chicago website, <http://www.cairchicago.org>.

A. The Naturalization Process

Congress enacted an amendment to the Immigration and Naturalization Act (INA) which states that the INS could not adjudicate an application for naturalization unless the agency received confirmation from the FBI that a full criminal background check had been completed on the applicant.⁵ This is a reasonable requirement to ensure that the applicant is eligible for naturalization and is not a risk to national security or public safety. What is unreasonable is the amount of time it takes the current procedural mechanism to complete these background checks. If an individual is an actual threat to national security it is universally agreed that this individual should not be awarded the benefit of citizenship. However, these individuals have previously cleared background checks and were granted permanent residency allowing them to legally live in the United States. In addition, the delay in determining whether an individual is a security risk allows for potential security threats to remain in the country until their background checks are complete.

The naturalization process includes an N-400 application for naturalization, an appearance before an INS officer to conduct an examination, and an investigation of the applicant conducted by the INS consisting of “review of all pertinent, police department checks and a neighborhood investigation.”⁶ The creation of the DHS established policies and procedures to verify that persons receiving a benefit under the INA were not involved in activities against the United States.⁷ These policies and procedures require background checks that include reviews of computer database records maintained by DHS through its Interagency Border Inspection System (IBIS) which contains records and watch list information from law enforcement and

⁵ Immigration and Naturalization Act, Pub. L. 105-119, Title I, 111 Stat. 2448-49 (1997); Department of Homeland Security, 8 C.F.R. § 335.2(b) (2007).

⁶ 8 C.F.R. § 332.1(a), 335.1-2.

⁷ 8 C.F.R. § 335.2(b).

intelligence agencies, a full criminal background check by the Federal Bureau of Investigation known as the “fingerprint check” and an administrative check under the FBI’s national name check program known as the “name check.”⁸ The relevant statutes do not mandate the completion of an FBI “name check” or “IBIS check,” yet the policies exist.⁹

B. The FBI National Name Check Program

An overwhelming number of applicants eligible for naturalization are unable to do so because they are indefinitely delayed in the FBI name check portion of the background check. According to the FBI, the name check requests submitted by the USCIS are conducted on a “first-in, first-out” basis unless the USCIS specifically requests that a name check proceed to the front of the queue.¹⁰ The FBI name check consists of four stages. The first stage is called Batch Processing in which the names are electronically checked against the FBI’s Universal Index.¹¹ Sixty-eight percent of the name checks are cleared at this stage by having “no record” and are usually completed within 48 hours.¹² The names that do not clear at the first stage move onto the second stage known as name searching, which is a manual name search normally completed within 60 days, and another 22% of the requests are cleared by having “no record.”¹³ The remaining ten percent of the requests move on to the last two stages of file review and dissemination in which the individuals may be the subject of an FBI record.¹⁴ At this stage the FBI records must be retrieved and reviewed for “derogatory infor-

⁸ *Id.*

⁹ *Id.*

¹⁰ See *Yakubova v. Chertoff*, No. 06-3203, (E.D. N.Y. June 28, 2006).

¹¹ FBI National Name Check Program, <http://www.fbi.gov/hq/nationalnamecheck.htm> (last visited Aug. 21, 2007).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

mation.” An individual is considered the subject of an FBI record, or as having “derogatory information,” if the FBI ever approached the individual for even a voluntary interview, or if the individual’s name was mentioned in another investigation even if no charges were ever brought against him or her and the files have long been closed.¹⁵

The FBI claims that only one percent of the total name check requests submitted by the USCIS are delayed beyond a period of 120 days.¹⁶ In 2005, FBI processed more than 3.7 million name checks, and 45% of those checks were submitted by the USCIS for either naturalization or to obtain legal permanent residency.¹⁷ Despite FBI assertions, thousands of individuals are indefinitely delayed in the name check process, and an overwhelming number of these individuals are Muslims.¹⁸ Data produced by the government in ongoing litigation shows that of those individuals seeking naturalization that fall into this one percent, a disproportionate number are from predominantly Muslim countries or countries with significant Muslim populations.¹⁹ Through various pending lawsuits around the country, plaintiffs are challenging the effectiveness of the FBI name check in discovering actual national security threats. It seems that the criminal FBI fingerprint check and DHS’s IBIS should be able to identify security threats much more efficiently, and any new discovery of harmful information in the FBI name check phase would be nonexistent or nominal.

The inefficiencies of the current background check procedures became clear in recent litigation. When the various agencies are unable to explain the delays, they begin to play the blame game, pointing fingers at each other and ultimately providing no resolve. In a current federal lawsuit filed in the sum-

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See *Yakuba*, *supra* note 10, at 12.

¹⁹ *Id.*

mer of 2006, the plaintiff is an individual who completed all of his naturalization requirements in March of 2002 and is still waiting to become a citizen.²⁰ When the government was repeatedly asked for the reason of delay, the plaintiff was continually informed that his application was in the FBI name check stage of investigation, and USCIS could not make a decision on the application until this portion of the investigation was complete.²¹ However, the plaintiff was assured that the USCIS made an expedite request on his file to the FBI in order to complete the name check as soon as possible. Recently, it was discovered through a declaration from Michael A. Cannon, FBI Section Chief of the National Name Check Program, that the plaintiff's FBI name check had been completed by the FBI in 2004 and has been with the USCIS since that time.²² The USCIS simply failed to make a decision. This individual is one of many whose citizenship has been delayed due to agency errors or oversights and because of the inefficiency of the agencies processing current background checks.

The majority of the citizenship delay cases reported to our office come from those who are legitimately awaiting the outcome of the FBI name check. The unfortunate scenario is that after having exhausted all of their administrative remedies, the only way for individuals to get actual answers from the government or to clear themselves of the background check is through the additional burden of filing a lawsuit in federal court. Many individuals are unable to pursue litigation and are therefore prevented from finding any relief. On February 7, 2006, the USCIS issued a memorandum listing the criteria for expediting an FBI name check, and one of the listed criteria was the filing of suit in

²⁰ Baker v. Gonzalez, No. 06-3841 (N.D. Ill. July 17, 2006). Additional details of Baker's case are stored in the CAIR files at 28 E. Jackson Blvd., Suite 1410, Chicago, Ill. See also CAIR-Chicago website, <http://www.cairchicago.org>.

²¹ *Id.*

²² *Id.*

federal court.²³ The obvious result of this was a surge of litigation by individuals who had the means to file lawsuits. This supposedly led to a backlog on the expedite and led to the USCIS issuing a memorandum in December of 2006 which eliminated filing a federal suit for review as automatic expedite criteria.²⁴ Despite the policy change, Assistant U.S. Attorneys in certain districts can still have USCIS make an expedite request to the FBI at their own discretion for cases filed in federal court.²⁵ These ad hoc policies create an undue burden by only allowing those with the financial ability to file lawsuits in federal court the possibility of having their applications reviewed or the assurance that they will make it through the FBI name check and be naturalized.

The current delays are understandable in light of the higher number of name check requests submitted to the FBI as a result of the government agencies' changed policies. However, it is unfortunate that Muslims have become targeted by the agencies involved and therefore the most impacted by these delays. Of all of the citizenship delay clients CAIR-Chicago has served to expedite, none have been denied citizenship due to information discovered from the FBI name check portion of the background investigation.

II. OBSTACLES TO THE RIGHT TO TRAVEL FREELY

The United States Supreme Court has stated that, "distinctions between citizens solely because of their ancestry are by their very nature odious to free people whose institutions are founded upon the doctrine of equality."²⁶ Unfortunately, we find ourselves in an atmosphere where present policies create

²³ Memorandum from USCIS on Processing Expedited FBI Name Check Requests (Feb. 7, 2006).

²⁴ Internal Memorandum from USCIS on FBI Name Checks Policy & Process Clarification for Domestic Operations (Dec. 21, 2006).

²⁵ *Ghaffarpour v. Gonzalez*, No. 06-3842 (N.D. Ill. Feb. 23, 2007).

²⁶ *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

such distinctions. Racial profiling is deemed acceptable as long as it is done to protect national security.²⁷ All American citizens and residents are willing to do their part to ensure their safety and the safety of others while traveling; however, all too often there are burdens that come with traveling while Muslim or looking Muslim.²⁸ One of these burdens is the uncertainty of whether one can travel without substantial delay or if the ability to travel will be denied altogether. This delay or loss of mobility can result in real economic or social harms to individuals who rely on their ability to travel. The scenarios range from being removed from an airplane because an individual “looks suspicious” (a.k.a. looks Muslim) to being stopped at the border, escorted by armed officers, handcuffed, physically abused, questioned and detained because the individual was mistakenly identified as someone on a government watch list. Arbitrary denial of travel and the continual false positives associated with mistaken identity of certain individuals should not be regarded as acceptable as the shoe-removal and limitation of liquid policies in airport security procedures. The difference lies in the application of the policy to all individuals traveling versus application to only certain individuals.

A. Transportation Security Administration's Watch Lists

The Transportation Security Administration (TSA) created after September 11, 2001, is part of the DHS. The TSA is

²⁷ Rep. John Cooksey, R-La.: “If I see someone come in and he’s got a diaper on his head and a fan belt around that diaper on his head, that guy needs to be pulled over and checked.” Paul Nelson, Wis. congressional candidate: “Racial profiling is one way that we can cut down on security risks,” Nelson said in an interview with WIXK Radio in New Richmond. When asked how to tell what a Muslim male looks like, Nelson replied, “Well, you know, if he comes in wearing a turban and his name is Mohammed, that’s a good start.” CAIR-Chicago, <http://www.cairchicago.org/inthenews.php?file=pantagraph09102006> (last visited Aug. 21, 2007).

²⁸ Eric Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571 (2002).

charged with developing policies to ensure travel security. Since its creation, the TSA is authorized to maintain watch list names of individuals who pose a threat to civil aviation. The TSA maintains records for at least two lists, one is the “No Fly” list and the other is known as the “Selectee” list.²⁹ Individuals on the “No Fly” list are not allowed to board commercial aircrafts, and individuals on the “Selectee” list must go through more extensive screening before boarding.³⁰ The problem with these watch lists is that oftentimes innocent individuals are misidentified, harassed, humiliated, detained and not presented with the opportunity to completely remove themselves from such watch lists. Just because an individual is cleared as being misidentified on one trip does not mean that the individual will not be misidentified the next time he or she travels. Innocent individuals are repeatedly stopped, questioned, searched and detained.

The typical scenario occurs at the airline counter where one discovers that his or her name is on the national watch list. Being on a watch list means that this person’s name is on a list of persons “who posed, or were suspected of posing, a threat to civil aviation or national security.” Traditionally, the relief from being on such a watch list is to fill out a Passenger Identity Verification form (“PIV form”), provide supporting documents verifying identity and submit it to TSA. This may assist TSA to assess the individual’s actual identity. The PIV form itself states, “[t]he TSA clearance process will not remove a name from the watch lists. Instead this process distinguishes passengers from persons who are in fact on the watch lists by placing their names and identifying information in a cleared portion of the Lists.”³¹ The problem is that going through this process is not likely to reduce the airport hassles.

²⁹ *Gordon v. F.B.I.*, 390 F. Supp.2d 897 (N.D. Cal. 2004).

³⁰ *Id.*

³¹ Traveler Inquiry Form, Department of Homeland Security (Mar. 1, 2007), available at http://www.dhs.gov/xlibrary/assets/DHSTRIP_Traveler_Inquiry_Form_030107.pdf (last visited Aug. 20, 2007).

The absurdity of these watch lists is that it is a point blank assault on civil liberties. Essentially, the federal government is allowed to put names on a list without doing a simple check for mistaken identity. Logically, no one's name should be added to such a list or remain on it without a clear explanation of the charges, and TSA should offer the opportunity to challenge any errors or false charges. The government is arbitrarily imposing charges of criminal intent on individuals and using procedures that violate Fifth Amendment due process rights.

B. Traveling While Muslim

In addition to being misidentified through a watch list, Muslims are also victims of in-person racial profiling and assumed to be threatening because of their appearance, mere physical characteristics or behavior. Being a Muslim means to be a follower of the faith of Islam, but all too often looking Muslim is wrongfully and automatically translated as being a potential terror threat. The government should not allow its policies to treat innocent Americans as terrorists.

Shortly after September 2001, a U.S. citizen of Middle Eastern origin had cleared airport security checks and boarded a United Airlines flight from Los Angeles to New York.³² Shortly after he was seated on the airplane he was told that his presence on the plane made the crew uncomfortable.³³ After disembarking from the airplane, the individual was not subject to any questioning or searches and was scheduled for the next flight to New York.³⁴ Upon filing a lawsuit for discrimination, the district judge ruled that the discretion of the pilot or crew "does not grant them the license to discriminate."³⁵

³² Bayaa v. United Airlines, Inc., 249 F.Supp.2d 1198, 1200 (C.D. Cal. 2002).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 1205.

In June 2005, the American Civil Liberties Union (ACLU) filed a lawsuit on behalf of Akif Rahman, a U.S. citizen by birth.³⁶ Prior to the filing of the suit, Rahman had been unlawfully detained and questioned by DHS on five separate occasions when he re-entered the country after being abroad because he was misidentified.³⁷ Four of the five detentions lasted anywhere from two to six hours, which is more time than necessary to determine his identity for re-entry into the United States.³⁸ On May 8, 2005, Rahman entered the United States after a trip with his family to Canada through the Detroit-Windsor tunnel.³⁹ After presenting his identification he was told by the DHS officer to turn off his vehicle, hand over his keys and was escorted by agents away from his family.⁴⁰ He was detained for six hours, handcuffed for three of them and kicked while they searched his person.⁴¹ His wife and two young children were detained separately for six hours with no food.⁴² It is a travesty for an innocent individual and his family to be detained for six hours to clear up an issue of misidentification.

On June 19, 2006, the ACLU amended the Rahman complaint to add other similarly situated plaintiffs to the class action. The named plaintiffs are all U.S. citizens of South Asian or Middle Eastern descent and almost all are Muslim.⁴³ They all travel regularly for lawful reasons such as business and family trips.⁴⁴ None of the named plaintiffs have engaged in any unlawful conduct that would provide justification for mistreatment to them or their families upon re-entering their country of citizenship.⁴⁵

³⁶ Complaint, Rahman v. Chertoff, No. 05-3761, (N.D. Ill. June 27, 2005).

³⁷ *Id.* at 2-3.

³⁸ *Id.*

³⁹ *Id.* at 4.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Amended Complaint, Rahman v. Chertoff, No. 05-3761, (N.D. Ill. June 27, 2005).

⁴⁴ *Id.*

⁴⁵ *Id.*

Two of the named plaintiffs were wrongly classified as armed and dangerous and were either escorted away by armed officers or had a weapon pointed at his person.⁴⁶ Five of the named plaintiffs were subject to body searches without consent.⁴⁷ Three of the named plaintiffs were unlawfully handcuffed.⁴⁸ Six of the named plaintiffs were detained while traveling with young children or grandchildren.⁴⁹ Two of the named plaintiff's family members were detained "in areas that [we]re unreasonable and grossly inappropriate, especially for young children."⁵⁰ The facts alleged in the lawsuit can only lead to the conclusion that the current system is inefficient and misuses government resources to wrongly attack innocents because the current procedures are not compatible with the watch list's original purpose and in essence denies civil liberties to a large number of individuals.

In November of 2006, controversy brewed when six Imams (Muslim clerics) were removed from a US Airways flight traveling from Minneapolis to Phoenix.⁵¹ They engaged in prayer prior to boarding the plane which seemed to arouse suspicion of US Airways staff and passengers.⁵² All six Imams were removed from the flight after boarding and were questioned by federal law enforcement (including the FBI, TSA, United States Marshals Service and the Secret Service) for several hours prior to being released without charges. A bomb sniffing dog investigated the men, their belongings and the airplane and obviously found nothing.⁵³

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Sarah Schulte, *Imams detained in Minneapolis*, ABC 7 News, Nov. 21, 2006, available at <http://www.cairchicago.org/inthenews.php?file=abc711212006> (last visited Aug. 21, 2007).

⁵² *Id.*

⁵³ *Id.*

The Department of Homeland Security (DHS) denies engaging in racial profiling, but it is difficult to see their claim as legitimate in light of the many lawsuits across the country alleging discriminatory behavior on the part of the government and its agencies. The DHS Office of Civil Rights and Civil Liberties admits that there are some problems with the watch lists, but counter by saying that many Muslim Americans travel without difficulties. The CAIR-Chicago office continually hears from its American Muslim constituency that they fear to travel because of the potential harassment and humiliation they may face when returning to the United States, their country. Many refer to the entire travel and re-entry process as a nightmare. It is disconcerting for American Muslims to feel like second-class citizens and question the existence of their rights. The DHS has recently put into place a Travel Redress Inquiry Program (TRIP) in an attempt to create a “single point of contact for individuals who have inquiries or seek resolution regarding difficulties they experience during their travel screening at transportation hubs . . . or crossing U.S. borders.”⁵⁴ The effectiveness of DHS TRIP as a method of correcting misidentifications and protecting the civil rights of innocent Americans remains to be seen.

III. THE USA PATRIOT ACT AND ITS EFFECT ON ARAB AND MUSLIM AMERICANS

Although the PATRIOT Act was renewed with some modifications to the provisions that caused the greatest amount of criticism among the public, the Act still raises concerns over the preservation of civil liberties in the United States. Although the Act does not explicitly target Arabs or Muslims as a group, it is clear that its effect is most strongly felt by Arab and Muslim Americans. It is perhaps the Act's disproportionate impact on the Muslim community that has prevented strong opposition, as

⁵⁴ DHS Traveler Redress Policy, *available at* <http://www.tsa.gov/travelers/redress/index.shtm> (last visited Aug. 21, 2007).

many Americans may feel that the civil liberties curtailed in the Act would not affect them because they are not the targets of the investigation. Often, people are willing to forfeit the civil liberties of others if they believe it will make themselves more secure. The counter argument offered by many civil liberties activists is that any curtailing of civil liberties essentially affects everyone, not just certain groups.

The fact remains that the individuals most affected by the provisions of the PATRIOT Act are Arabs and Muslims. This does not exclude the possibility or likelihood that others will be affected by the Act, but it does force the rest of society to consider how hard it will fight for the rights of others. Americans must learn to rally in support of the rights of others, even if that support is ultimately altruistic. Through this system of support the rights of all are ultimately protected. This support system can be accomplished not by trying to convince everyone that their civil liberties will be preserved, but by convincing everyone that they have a civic duty to protect the rights guaranteed by the constitution even if there is no threat posed to them directly. This was essentially the principle behind the civil rights movement, when many whites marched for the rights of blacks and the women's liberation movement, where many men advocated for the rights of women. This ideal must persist if civil liberties are to be maintained.

Section 215 of the Act came under severe criticism because it allowed law enforcement officers to obtain surveillance warrants under the Foreign Intelligence Surveillance Act (FISA) for domestic suspects without having to show any legal standard such as probable cause or reasonable suspicion.⁵⁵ Further, the judge reviewing the application for a warrant was not allowed to deny it.⁵⁶ When the section came up for reauthorization, amendments were made that explicitly gave a judge the authority to deny an

⁵⁵ USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. (2007).

⁵⁶ *Id.*

application for a warrant under FISA.⁵⁷ Also under the amendments, law enforcement officers must issue a statement of facts explaining how the individual is involved in a counter-terrorism investigation.⁵⁸ However, no proof is required of the connection between the individual and the counter-terrorism investigation. Neither probable cause nor reasonable suspicion is required to justify the warrant.⁵⁹

A. FBI Targeting of Arabs and Muslims Through the USA PATRIOT Act

Perhaps the most damaging effect the Act has on civil liberties, particularly for Arab and Muslim Americans, is the reduction in the standard that law enforcement must meet in order to survey, search and seize persons and their property. It is unknown just how many people are currently under surveillance because provisions under the Act make it possible to delay and even withhold notification to the surveyed.⁶⁰ Under the Act, law enforcement officers need only state to a judge that surveillance is needed to pursue a counter-terrorism investigation.⁶¹ They need not show the judge proof, merely a statement of facts that illustrates how the individual is related to a counter-terrorism investigation.

One of the ways in which law enforcement officers use the USA PATRIOT Act to target Arab and Muslim Americans is by asking them to submit to “voluntary interviews.”⁶² Indeed, these interviews are voluntary, but sometimes the individual is not

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See PATRIOT Act, *supra*, note 55.

⁶¹ *Id.*

⁶² CAIR-Chicago Press Release, Prominent Chicago Area Organizations and Social Justice Activists ask FBI to Make Spy Files Public, *available at* http://www.cairchicago.org/presscenter.php?file=pr_spyfiles12022004 (last visited Aug. 21, 2007).

made aware of this fact. Often, the individual is not made aware of his or her rights to have an attorney present. On occasion, the individual is told he or she “does not need an attorney.”⁶³ Usually, such a comment is enough to intimidate the individual into submitting to the interview without attorney representation. CAIR-Chicago has seen many of these cases firsthand.

On one occasion, a member of the Muslim community informed CAIR-Chicago that the FBI had contacted him for one of these interviews.⁶⁴ CAIR-Chicago contacted the FBI agent and determined that the interview was voluntary and solely for the purpose of “gathering information.” CAIR-Chicago advised the community member to have an attorney represent him during the interview should he decide to participate. The individual declined to have an attorney present, believing that attorney representation would be an implied admission of some sort of guilt. The individual wanted to prove to the FBI that he had nothing to hide. He did, however, invite one of the CAIR-Chicago Civil Rights Department staff to sit in on the interview, upon the condition that the staff member would not intervene. The staff member reported that the FBI agent began by asking the individual whether he had experienced any problems while traveling, either at the airports or within the countries themselves. This led the agent to inquire about the individual’s travels, who he saw and met with, and what opinions or information he heard or espoused. At one point, the individual admitted to meeting with “important people” in the Arab world to give them advice on “how to solve their problems.” During the interview, the individual reiterated to the FBI agent that he had nothing to hide and stated, “You know I’m not afraid, right?” To which the FBI agent replied, “Of course, we love that about you.” Throughout the course of the interview, the individual

⁶³ *Id.*

⁶⁴ Details of this client’s case and other similar CAIR cases are stored in the CAIR-Chicago files at 28 E. Jackson Blvd., Suite 1410, Chicago, Ill. *See also* CAIR-Chicago website, <http://www.cairchicago.org>.

shared his political beliefs about the United States, its policies towards the Middle East, and President George Bush's responsibility for 9/11.

Normally, however, constituents decline the interview after learning that it is voluntary. Those who decide to proceed often agree to allow CAIR-Chicago or another attorney represent them. Most often, when the FBI agent is informed that the individual will be represented by an attorney, the agent cancels the interview or does not follow up to set up an appointment. On one occasion, a CAIR-Chicago staff member was told that she was "getting in the way" by representing a constituent.

What is important to note is that the PATRIOT Act has not merely lowered the standard for allowing law enforcement officers to search and seize the property of others, but it has also extended the ability of law enforcement to seek out and question suspects.⁶⁵ Since the agent knows nothing of the individual going into the interview, there is no basis for suspecting the person of having committed a crime. All that is generally known about the individual is that he or she is Arab and/or Muslim and that he or she may have espoused criticism about the U.S. policies or know of someone who has. Because the interviews are ultimately voluntary, the law enforcement officer has crossed no line legally.⁶⁶ Although the agent's actions are not illegal, the intimidation tactics that are sometimes used to get people to submit to such interviews and the initial motivation for the interview based on the person's ethnicity or religion is contrary to the principles of the constitution.⁶⁷

⁶⁵ See, PATRIOT Act, *supra*, note 55.

⁶⁶ See *Dickerson v. United States*, 530 U.S. 428, 436 (2000) (holding that statements voluntarily made are admissible).

⁶⁷ Courts have recognized that racial profiling is a violation of the 14th Amendment, but have held that determining the subjective motivation behind targeting specific individual is "not relevant" in determining the reasonableness of a law enforcement stop. It is the officer's conduct post-stop that is subject to the Court's review. *Atwater v. City of Lago-Vista*, 532 U.S. 318, 372 (2001).

Rather than pursuing crimes, law enforcement officers pursue people in the hopes that they will find a crime. It is in this way that the USA PATRIOT Act encourages racial profiling by giving law enforcement the tools they need to target individuals on the basis of their ethnicity or religion.

IV. DUE PROCESS IN THE BUREAU OF PRISONS

The Bureau of Prisons currently designates certain inmates as “terrorist inmates” and imposes stricter restrictions upon them, as well as special administrative measures that greatly limit their communications and privacy.⁶⁸ For those designated a “terrorist inmate,” all of his or her mail is read and analyzed before being given to the inmate, and all telephone conversations are recorded and listened to.⁶⁹ Additionally, 33 inmates designated as “terrorist inmates” are currently subject to special administrative measures.⁷⁰ Special administrative measures are used for people considered to pose a “substantial risk” such that their “communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.”⁷¹ According to the Bureau of Prisons, a person is designated a terrorist inmate if they have been “convicted of, charged with, associated with, or linked to terrorist activities, or [belong] to organizations that planned and/or executed violent and destructive acts against the government and/or privately owned U.S. corporations.”⁷²

⁶⁸ 28 C.F.R. § 501.3 (1996). See, e.g., U.S. Attys’ Man 9-24.100.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Department of Justice, Fact Sheet: *Security at the Department of Justice Bureau of Prisons Administrative Maximum Security Facility*, Feb. 21, 2007, available at http://www.usdoj.gov/opa/pr/2007/February/07_opa_104.html (last visited Aug. 20, 2007).

Designating an inmate who was not convicted of terrorism a terrorist inmate violates his or her due process rights because the effect of such a designation has a real and substantial impact on the inmate's constitutional rights. As the Supreme Court noted in *Turner v. Safley*, the first principle in the analysis of prisoners' constitutional rights is that "federal courts must take cognizance of the valid constitutional claims of prison inmates."⁷³ Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."⁷⁴ Among other fundamental rights, inmates are entitled to due process.⁷⁵ However, the courts have held that restrictions that are "reasonably related to legitimate penological interests" do not violate the constitutional rights of inmates.⁷⁶ In determining whether such restrictions are reasonable, courts apply the *Turner* test, considering whether: 1) there is a valid, rational connection between the purported governmental interest and the regulation, 2) the inmate has alternative means of exercising his or her constitutional right, 3) the accommodation of the right will have a significant impact on the prisoner's fellow inmates, prison staff or prison resources and 4) there are ready alternatives available to the prison, the absence of which is evidence of the reasonableness of a prison regulation.⁷⁷ It is important to note that in the cases upholding the imposition of special administrative measures on inmates, the likelihood that the inmate will commit a crime if they are not subjected to restrictions must reasonably be established.⁷⁸ This is the first factor of the test in *Turner*, ei-

⁷³ *Turner v. Safley*, 482 U.S. 78, 84 (1987). *Editor's Note*: The *Turner* decision has been superseded by statute. On July 28, 1995, Sen. Harry Reid (D-NV), the sponsor of the original Senate amendment to exempt claims of inmates from RFRA's coverage, introduced a bill in the Senate that would have the same effect. S. 1093, 104th Cong., 1st Sess. (1995); see 141 CONG. REC. S10,876, S10,895.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See, *Turner*, *supra* note 73, at 89.

⁷⁷ *Id.* at 89-90.

⁷⁸ *Id.*

ther there must be a rational connection between the government's interest and the regulation, or the restriction must be related to a general penological concern and imposed on all inmates.⁷⁹ Restrictions imposed on the vast majority of designated "terrorist inmates" lack this important element. The terrorist inmates have never been convicted of terrorism. The few who were charged with a terrorism-related count were later acquitted or the charges were dropped by the government. Thus, the argument that they are likely to continue their illegal activity is tenuous since it was never established that they were ever engaged in that particular illegal activity to begin with.

An example of this principle is found in *U.S. v. Felipe*.⁸⁰ In *Felipe*, the Court held that special administrative measures imposed on Luis Felipe, the leader of the Latin Kings gang in New York, did not violate his constitutional rights because Felipe had been convicted both of conspiring to kill several people from within prison, as well as soliciting new gang members.⁸¹ Felipe was originally serving a nine-year sentence for second-degree manslaughter.⁸² Prison officials later learned that he had been communicating with inmates at other prisons through third parties and had been planning illegal acts that other gang members would perpetrate both inside and outside of prison.⁸³ Felipe was then sentenced to life imprisonment based on evidence obtained by those correspondences as well as the testimony of witnesses to the crimes he orchestrated.⁸⁴ During sentencing, the district court imposed "special conditions of confinement."⁸⁵ The Court in *Felipe* found that all four factors in the *Turner* test had been met.⁸⁶ The goal of preventing Felipe from carrying out illegal

⁷⁹ *Id.*

⁸⁰ *U.S. v. Felipe*, 148 F.3d 101 (2d Cir. 1998).

⁸¹ *Id.*

⁸² *Id.* at 105.

⁸³ *Id.*

⁸⁴ *Id.* at 106.

⁸⁵ *Id.* at 107.

⁸⁶ *Id.* at 111.

acts while inside prison was “unquestionably a legitimate penological interest.”⁸⁷ The restrictions on Felipe’s communications were reasonably related to that interest because it was his communications with other individuals that allowed him to orchestrate his crimes.⁸⁸ The Court also held that there were alternatives available to Felipe that were provided by the district court, thus fulfilling the second factor of the *Turner* test.⁸⁹ The Court found that the third factor of the test was met because not restricting his communications would put both inmates and individuals outside of prison at risk.⁹⁰ Finally, the Court held that the fourth factor of the test was met because “there [were] no readily available alternative means of protecting people from [Felipe’s] wrath.”⁹¹

After a five-week trial, Felipe was found guilty.⁹² Based upon this conviction, the Court saw the necessity of imposing special administrative measures. As the Court notes, “From his jail cell, Felipe committed the very crimes for which he is now serving a life sentence. And, until shown differently, we agree with the district court’s observation that, given the opportunity, [Felipe] would likely continue such illegal activity.”⁹³ Therefore, a conclusion that special administrative measures needed to be imposed based on the established patterns of his behavior was not a violation of his due process rights, because he had, at the very least, been given the opportunity to face his accusers at trial.

When such restrictions are imposed more broadly, prison officials often cite general safety concerns as the underpinning legitimate interest. Such was the case in *Turner*, where a prison administration imposed a blanket prohibition on inmates mar-

⁸⁷ *Id.* at 110.

⁸⁸ *Id.*

⁸⁹ *Id.* at 111.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 104.

⁹³ *Id.* at 111.

rying or corresponding with inmates at another prison.⁹⁴ The Supreme Court upheld the restriction on correspondences between inmates, but held that the blanket prohibition on marriage was an unnecessary violation of the inmates' constitutional right to marry.⁹⁵ The Court distinguished the right to free speech from the right to marry by reasoning that the regulations of inmate speech were reasonably related to legitimate penological interests, whereas the regulations restricting inmates' right to marry were not.⁹⁶ General restrictions for inmates are also subject to the *Turner* standard, but the interests served must be general as well.

Restrictions placed on specific inmates are usually based on instances where, as in *Felipe*, the inmate was actually held to have engaged in certain conduct and the restrictions were imposed to stop them from continuing such conduct.⁹⁷ Most of the inmates designated as terrorists were never convicted on any charge of terrorism. An example of this is the case of Enaam Arnaout, the former director of the Benevolence International Foundation.⁹⁸ The Benevolence International Foundation was a charitable organization that provided humanitarian aid to civilian populations throughout the world. The Foundation was designated a terrorist organization shortly after 9/11, and Arnaout was charged with, among other counts, financing a terrorist organization such as Al-Qaida.⁹⁹ Arnaout was convicted on one count of racketeering and wire and mail fraud; however, due to the post-9/11 environment, prosecutors and the media were quick to portray his conviction as a "win" in the war on terror, despite the district judge's explicit statements to the prosecution that there was no evidence linking Arnaout to terrorism.¹⁰⁰ In

⁹⁴ See *Turner*, *supra* note 73, at 78.

⁹⁵ *Id.*

⁹⁶ *Id.* at 94-95.

⁹⁷ See *Felipe*, *supra* note 80.

⁹⁸ *U.S. v. Arnaout*, 282 F.Supp.2d 838, 843 (N.D. Ill. 2003).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

fact, in Arnaout's plea agreement, the government concedes that neither Arnaout nor the Benevolence International Foundation had any ties to Osama bin Laden, Al-Qaida or any interests contrary to the interests of the United States.¹⁰¹ Arnaout's wire and mail fraud conviction stemmed from his providing boots, uniforms, tents and an ambulance for Bosnians fighting against the genocide of their people.¹⁰² The district judge specifically denied the government's motion to apply terrorism enhancement measures on Arnaout. The district court highlighted the exhaustive list compiled by Congress in developing what sort of crimes could fall under the classification of terrorism and held that the crime for which Arnaout was convicted (racketeering) does not fall under any of the crimes in the list.¹⁰³ The court stated:

In sum, Congress has specifically and exhaustively identified criminal offenses that constitute federal crimes of terrorism. Those specifications control application of § 3A1.4. Further, Congress clearly intended the revised terrorism guideline to be 'applicable only to those specifically listed federal crimes of terrorism, **upon conviction of those crimes** with the necessary motivational element to be established at the sentencing phase of the prosecution.' Conference Report on S.735, 142 Cong. Rec. H. 3305-01, § 730, Directions to Sentencing Commission. Arnaout stands convicted of conspiracy to commit racketeering, in violation of 18 U.S.C. § 1962(d). Arnaout's offense is not included in the exhaustive list of federal offenses defined by Congress as terrorism crimes.¹⁰⁴

¹⁰¹ *Id.* at 840.

¹⁰² *Id.*

¹⁰³ *Id.* at 843-844.

¹⁰⁴ *Id.* at 844 (emphasis and bold added).

Despite never having been convicted of terrorism, Arnaout has been designated a terrorist inmate and was recently transferred to the Federal Correctional Institution in Terra Haute, Indiana.¹⁰⁵ He, along with several other Muslim inmates convicted on non-terrorism related charges, has been placed in Terra Haute and designated terrorist inmates without ever having had an opportunity to challenge the designation or otherwise face their accusers.

In this way, Arnaout, and about 200 other inmates like him, have had their due process rights violated by the Bureau of Prisons. The special administrative measures, if used against an inmate who was actually convicted of a terrorism related charge, may be constitutional. However, the Bureau of Prisons' current definition of a terrorist inmate violates the rights of those who have never been given due process to challenge such a definition. This is simply another illustration of the gradual stripping away of due process rights in the name of fighting terrorism. Anything is justified as long as the supposed terrorist is captured.

V. TARGETING MUSLIMS THROUGH THE MILITARY COMMISSIONS ACT

The newly enacted Military Commissions Act, which gives the President more authority to establish military commissions that try people accused of being "unlawful alien combatants," is another alarming illustration of the direction in which the United States is heading.¹⁰⁶ The erosion of America's civil liberties in the name of the war on terror will primarily affect Arabs and

¹⁰⁵ CAIR-Chicago is current assisting Arnaout with his civil rights claims. Additional case information is stored in the CAIR-Chicago files at 28 E. Jackson Blvd., Suite 1410, Chicago, Ill. *See also* CAIR-Chicago, http://www.cairchicago.org/ournews.php?file=on_enaam_arnout (last visited Aug. 21, 2007).

¹⁰⁶ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2602 (2006).

Muslims, living both within the United States and abroad. The Act denies Arabs and Muslims their right to resist U.S. policy by categorically stripping them of any legitimate means of resistance. The consequences of the legislation will be to further divide the United States and the Muslim world and create more of an opportunity for the United States to violate the human and civil rights of Arabs and Muslims.

The Military Commissions Act will do away with some of the most fundamental rights of the U.S. justice system. Some of the rights the accused will be deprived of are: the right to a writ of habeas corpus; the right of the accused to review the evidence against them; the right to exclude hearsay (unconfirmed information) testimony and the right to a jury trial. Instead of the courts, the rules and procedures put in place for the military commission will be set by the Secretary of Defense and the Attorney General.¹⁰⁷ Evidence obtained without a search warrant or other authorization may be admitted into trial.¹⁰⁸ Finally, statements of the accused made by “coercion or compulsory self-incrimination” (i.e. torture) may be admitted into evidence.

The framers of the Constitution knew that in order to establish a sustainable libertarian society, protecting the rights of the accused would be essential. The presumption “innocent until proven guilty” is at the foundation of these rights. It is the job of the courts to determine the guilt or innocence of a person. The purpose of guaranteeing certain rights to the accused is to provide every opportunity for a fair trial, and in so doing, minimize the number of innocent people convicted. This was especially important to the framers because they wanted to protect political dissenters from being stifled and retaliated against for their political views.

Since the Bush Administration’s war on terror has only dealt with terrorist threats from the Muslim world, it is safe to assume

¹⁰⁷ Military Commissions Act of 2006, Pub. L. No. 109-366, § 949(a), 120 Stat. 2608 (2006).

¹⁰⁸ *Id.* at § 949a(b)(2)(B), 120 Stat. 2608.

that the designation of “unlawful alien combatants” will mainly be attributed to Arabs and Muslims. Because of the way that “unlawful alien combatants” is defined in the Act, it is also safe to assume that the definition can and will be applied broadly to incorporate individuals who may oppose U.S. policy in the Middle East. For years in the United States, Arabs and Muslims have feared that they will be stripped of their civil liberties in the name of national security. Since the Act applies to “aliens,” those Arabs and Muslims living legally or illegally in the United States but not yet naturalized as citizens, are subject to this Act. Prior to the enactment of the legislation, anyone who came before the court, whether citizen or alien, was entitled to due process rights.

Also subject to the Act are the hundreds of individuals currently being detained in Guantanamo Bay. The legislation applies to alleged activities that were conducted on, before and after 9/11. This means that all of the prisoners in Guantanamo Bay who have not yet had the opportunity to appear before a court for a hearing on their case will now be subject to a military commission and will not have an adequate opportunity to defend themselves.

Perhaps more telling is that resistance fighters opposing United States occupation of Iraq may also be subject to the jurisdiction of the Military Commissions Act. Although they are resisting U.S. occupation of their own country, the Act’s definition places Iraqi resistance fighters within the scope of unlawful alien combatants. The implication is that these fighters will be subject to U.S. military court for the crime of resisting U.S. occupation of their country. In so doing, the United States has allotted itself one more way to undermine the legitimacy of a legitimate resistance movement – a movement that opposes the foreign occupation of a sovereign nation. By claiming that resistance in Iraq is illegal, the United States essentially claims authority to determine what is legal and illegal in another nation. Further, the United States audaciously claims jurisdiction to try

those actions in a U.S. military court, not just for war crimes or crimes against humanity, but for the broad crime of engaging in any hostilities or providing support for any hostilities against the United States. Through the legislation, the United States has, in effect, declared that it may do as it wishes anywhere in the world, and anyone who resists or is in any way “hostile” toward the United States will be subject to criminal punishment in military court.

Additionally, per the Act, those resistance fighters, and anyone else brought to trial under the legislation, will not be able to invoke rights guaranteed by the Geneva Conventions to protect them.¹⁰⁹

Perhaps most importantly, the Military Commissions Act does not provide any clear system or standard for determining who is an “unlawful alien combatant.” An individual is designated an “unlawful alien combatant” by a Combatant Status Review Tribunal or other tribunal established under the authority of the President or the Secretary of Defense.¹¹⁰ There is no standard that the evidence against the individual must meet, nor any judicial review, before that individual is labeled an unlawful alien combatant, stripped of any due process rights and brought before the military commission for trial.¹¹¹

Because the Military Commissions Act does not apply to U.S. citizens, only the most conscientious of American citizens will vocally oppose the Act. In this way the Bush Administration is able to successfully delineate between those who are valuable to the administration (those who can vote), and those who are without voice in this country (aliens residing in the United States either legally or illegally). As the United States pursues its mission in the Middle East, it resembles more and more the oppressive regimes its founders and so many immigrants came to this country to escape. Erosion always begins with what is the

¹⁰⁹ *Id.* at § 948b(g), 120 Stat. 2602 (2006).

¹¹⁰ *Id.* at § 948d(c), 120 Stat. 2603 (2006).

¹¹¹ *Id.*

most on the periphery. Soon enough, however, the entire object is worn away.

CONCLUSION

Religious discrimination against Muslims in the post-9/11 era has taken on many forms. As has been illustrated here, such discrimination has manifested in restricting the Muslims right to travel, restricting the rights of inmates and denying due process rights to the accused. These forms affect some of the most fundamental values of American society. At the heart of these values is the idea that government does not bestow rights upon individuals, individuals are born with these rights and for this reason are always entitled to them. Therefore, it becomes incumbent on all members of society to collectively fight for the rights to which all members of society are entitled. Society has a civic duty to protect the rights guaranteed to all of its members. This is the only way that society can build a system of support whereby the rights of all are ultimately protected.